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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 556

CARL R. ANDERSON and GERRITT A. GATES, *Petitioners*

v.

EMPIRE SEAFOODS, INC. and CLEARY BROS. CONSTRUCTION COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review an order and judgment of the United States Court of Appeals for the Fifth Circuit entered June 27, 1968. The opinion and order of the Circuit Court of Appeals, not yet reported, are printed in the Appendix.

JURISDICTION

The order and judgment of the Circuit Court of Appeals were entered June 27, 1968. A timely petition for rehearing en banc by petitioners was denied July 30, 1968. (App. 26a) . The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1). The jurisdiction of the court of first instance (United States District Court for the Southern District of Florida) was founded upon Article 3, Section 2, and Article 1, Section 8 of the Constitution, and 46 U.S.C., Sec. 740, and 46 U.S.C., Sec. 185.

QUESTION PRESENTED FOR REVIEW

In a suit in admiralty for personal injuries wherein the petitioners were claimants and it was established that the petitioners while working on a bridge were injured as a result of a collision between a ship and the bridge, occurring through the joint fault of the shipowners and the bridge-building company, by which the petitioners were employed, did the Circuit Court of Appeals correctly hold that, although they might have judgment against the shipowner for the full amount of their damages, the petitioners, because they were subject to a state workmen's compensation law, had no direct right of recovery against the bridge-building company, so that the only liability of that company was to indemnify the shipowner for one-half the amount of damages paid by the shipowner to the petitioners?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions

Article 3, Sec. 2, Clause 1

> The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction; * * *

Article 1, Sec. 8, Clause 18

> The Congress shall have Power * * * to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Statutes

46 U.S.C., Sec. 740

> Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period
>
> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable waters: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of ac-

tion arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496.

46 U.S.C., Sec. 185

Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S. § 4285; June 5, 1936, c. 521, § 3, 49 Stat. 1480.

Florida Workmen's Compensation Law, Sec. 440.11, Florida Statutes

> Exclusiveness of liability. The liability of an employer prescribed in Sec. 440.10 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter an injured employee, or his legal representative, in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

STATEMENT OF THE CASE

This case involves a decree for damages for personal injuries entered in favor of petitioners Anderson and Gates by the United States District Court for the Southern District of Florida, sitting in admiralty, against Empire Seafoods Inc. (Empire) and Cleary Bros. Construction Company (Cleary). Cleary was a contractor constructing a drawbridge for the State of Florida across the St. Lucie River, a part of the Florida Intercoastal Waterway, at a point near Ft. Pierce, Florida. Anderson and Gates were employees of Cleary and members of a steel gang working on the bridge. Empire was the owner and operator of a

shrimp trawler, the Bora Bora. While passing through the Florida Intercoastal Waterway on August 23, 1963, the Bora Bora collided with the bridge, which was under construction. Anderson and Gates, who were working on the bridge at the time, were seriously injured as a result of the collision. The award of damages to Anderson and Gates by the District Court grew out of this accident.

Proceedings in the District Court

Empire filed a petition in the District Court for exoneration or limitation pursuant to the provisions of Secs. 4283, 4284 and 4285 of the revised statutes, as amended and supplemented. (R. 726) Anderson and Gates answered Empire's petition, denying the allegations of the petition, and claiming damages for personal injuries. (R. 737, 745, 752, 755) Thereafter, Empire impleaded Cleary. (R. 761-762, 764-770, 777, 786-788) Cleary answered the claims of Anderson and Gates, denying negligence on the part of Cleary. Cleary's answer also alleged that the exclusive remedy of Anderson and Gates was under the Florida Workmen's Compensation Law, Chapter 440, Florida Statutes. (R. 791-792) Answering Empire's impleading petition, Cleary denied negligence and again alleged that Cleary could not be called upon to indemnify Empire or contribute to Empire's liability to Anderson and Gates by virtue of the provisions of the Florida Workmen's Compenstion Law. (R. 793-797)

After trial the District Court entered its findings of fact and conclusions of law. (R. 814-846) The court found that Empire, Cleary, Anderson and Gates had all been guilty of some negligence or fault which contributed to the collision (R. 838-844); "that the joint

fault of [Empire] and Cleary was the proximate cause of the collision and resultant damages, with each substantially contributing to the composite fault" (R. 841); that in the case of Anderson and Gates, each "was guilty of negligence, which contributed to his own injury to a degree of twenty per cent thereof". (R. 844) The court found that Anderson had sustained damages in the amount of $210,517.20 (R. 829-833), and that the damages sustained by Gates amounted to $31,920.50 (R. 833-837).[1] In view of its finding that they were injured partly through their own fault, the court applied the comparative negligence rule and reduced the recoveries of Anderson and Gates by twenty per cent (R. 844). Accordingly, the court awarded damages to Anderson in the amount of $168,413.76 and to Gates in the amount of $25,536.40. (R. 844) Since Cleary was a self-insurer under the Florida Workmen's Compensation Act, and had paid workmen's compensation benefits to Anderson and Gates, the court ruled that they would be required to repay to Cleary the sums received by each for workmen's compensation. (R. 844)

The District Court held that the divided damages rule of admiralty was applicable. (R. 841) The court held further that under the Florida Workmen's Compensation Act Anderson and Gates had "no right of recovery against Cleary, except for workmen's com-

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[1] With respect to Anderson, who was 50 years of age at the time of trial (R. 830), the court found that "His prognosis is extremely guarded. He is permanently and almost totally disabled for the balance of his life. Assuming the best possible medical results, he will have a permanent total functional disability of at least 75 per cent of his body as a whole". (R. 830) The court found that Gates, aged 28, had suffered "partial permanent disability". (R. 837)

pensation benefits." (R. 844) Pointing out that they had received payments under the Florida Workmen's Compensation Law, the court denied a motion by Anderson and Gates for the entry of a final decree which would provide to them a right of direct recovery against Cleary. (R. 849-851)[2] In accordance with this ruling the final decree provided that Anderson and Gates recover the full amount of their damages from Empire, and that Empire recover from Clearly one-half of any and all sums paid by Empire to Anderson and Gates. (R. 851-853)

Proceedings on Appeal

On appeal to the Circuit Court of Appeals for the Fifth Circuit Anderson and Gates attacked the decree entered by the District Court, on the ground that if Empire was unable to pay the full amount of the damages,[3] Cleary would not be required to make up the deficiency, but would benefit thereby since it was required to pay only one-half of the amounts paid by

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[2] The District Court also relied on the fact that the "claimants have not sought any redress against the construction company [Cleary] in this proceeding." (R. 850)

But "it is the practice in admiralty to bring all parties before the court, and to determine the controversy on the merits as it appears from the proof, regardless of technicalties of pleading—always assuming * * * that no party is surprised or injured by that equitable proceeding." *Dampskibs Aktieselskabet Thor* v. *Tropical Fruit Co., et al.*, 281 Fed. 740, 742 (CCA 2, 1922). Cleary filed an answer to the claims of Anderson and Gates (R. 791), thereby eliminating any question of surprise.

[3] It was stipulated at trial that the value of Empire's vessel, the Bora Bora, was only $44,750. (R. 799) Empire Seafoods, Inc., was a small, family-owned corporation. One Noble A. Hardee, Jr., and his wife were the sole stockholders, and served as president-treasurer and vice-president, respectviely. (R. 200, 217, 218)

Empire. (Opinion of Circuit Court of Appeals, App. 21a) In its original opinion the Circuit Court of Appeals sustained this contention. Citing *Weyerhaeuser Steamship Co.* v. *United States,* 372 U.S. 597 (1963), the Court held that the divided damages rule was applicable, and that the scope of that rule was unaffected by the Florida Workmen's Compensation Law. (Opinion, App. 13a et seq; 22a)[4] Accordingly, the judgment of the District Court was reversed in part and the cause was remanded for the entry of a decree providing that Empire and Cleary each pay one-half of the entire damages, and that any part of the one-half damages assessed against either Empire or Cleary which the claimants were unable to collect be assessed against the other respondent, in addition to the one-half which that respondent in the first instance was compelled to pay. (Opinion, App. 22a) Except for this portion of the decree, the judgment of the District Court was affirmed.

Cleary filed a petition for rehearing in the Circuit Court of Appeals, contending that the District Court had correctly applied the divided damages rule by its decree providing for recovery by Anderson and Gates from Empire, and the recovery by Empire against Cleary of one-half the losses sustained by Empire in this respect.

Reversing its original position, the Court of Appeals granted Cleary's petition for rehearing and sus-

[4] The court held that although Anderson and Gates were negligent "we are convinced that the reduction of their respective recoveries under the comparative negligence doctrine is to be considered full penalty for their fault and that they must, therefore, be treated in the same manner as 'innocent third parties' " in applying the divided damages rule. (Opinion, App. 23a)

tained Cleary's position with respect to the decree. The court said (Order, June 27, 1968, App. 24a, 25a):

> "Upon reconsideration, we are convinced that what we said about the District Court decree in our original opinion was appropos only to those instances where, aside from a statutory prohibition, an innocent third party is injured by the mutual fault of vessels in a collision. *The Atlas,* 93 U.S. 302, 23 L.Ed. 863; *The North Star,* 106 U.S. 17, 1 S.Ct. 41, 27 L.Ed. 91.
>
> "But where a statute such as the Florida Workmen's Compensation Act here, the Federal Employer's [sic] Compensation Act in *Weyerhaeuser S. S. Co.* v. *United States,* 1963, 372 U.S. 597, and the Harter Act in *The Chattahoochee,* 1889, 173 U.S. 540, denies direct recovery against one of the two vessels (Cleary, the employer of Anderson and Gates), recovery can be had only against the other vessel for all of the damages sustained by the innocent party.
>
> * * *
>
> "The decree of the District Court is in all respects affirmed."

Thus, in its original opinion the Court of Appeals held unanimously that the Florida Workmen's Compensation Act did not bar direct recovery by the petitioners from Cleary; but upon rehearing on this point the court unanimously reached exactly the opposite conclusion.

ARGUMENT

In ruling that the Florida Workmen's Compensation Law was a bar to direct recovery by the petitioners from Cleary the Circuit Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

It is the established and ancient rule of admiralty that when a third party is injured in a collision occurring through the joint fault of two vessels the damages are apportioned equally between the two offending vessels, the right being reserved to the claimant to collect the entire amount from either of them in case of the inability of the other to pay its portion. *The Sterling* and *The Equator,* 106 U.S. 647 (1882); *The North Star,* 106 U.S. 17 (1882); *The Atlas,* 93 U.S. 302 (1876). Moreover it has been established by decisions of this Court that the traditional remedies of admiralty may not be taken away or watered down by state legislation in such a way as to deprive claimants of substantial admiralty rights. *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953); *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239 (1942). Specifically, this Court has held that a state workmen's compensation statute is inapplicable in an action in admiralty by a person injured by a maritime tort; that the injured person is entitled to compensation under rules recognized in admiralty. *Kellogg & Sons* v. *Hicks* (The Linseed King) 285 U.S. 502 (1932); *Southern Pacific Company* v. *Jensen,* 244 U.S. 205 (1917). Indeed this Court has held that in a suit in admiralty even the exclusive liability provisions of a federal employees' compensation act do not preclude an employee from enforcing a remedy recognized by the admiralty law, so as to recover directly from his employer for personal injuries. *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 731 (1967); *Reed* v. *Steamship Yaka,* 373 U.S. 872 (1963).

The Circuit Court of Appeals correctly held that under the Extension Act, 46 U.S.C., Sec. 740 and the Limitation Act, 46 U.S.C. 185, the District Court had admiralty jurisdiction and maritime law applied—

that is, that this case involved a maritime collision. (Opinion, App. 12a, 13a, 18a) The court was also correct in holding that the reduction of their respective recoveries under the comparative negligence doctrine placed the petitioners in the position of innocent third parties, injured in a collision caused by the mutual fault of the two respondents. See *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 408, 409 (1953) Given these sound premises the rule of the admiralty law should have been applied; that is, the damages should have been apportioned equally between the two offending parties, the right being reserved to the petitioners to collect the entire amount from either respondent in case of the inability of the other to pay. By failing to enter such a decree the court jeopardized the right of the petitioners to have as full a recovery as they otherwise would. In short, the court's decree deprived the petitioners of substantial admiralty rights. See *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 409-411 (1953) In this connection it should be noted that Empire Seafoods, Inc. is a small family-owned corporation (R. 200, 217, 218) and that it was stipulated at trial that the value of Empire's vessel, the Bora Bora, was only $44,750, (R. 799) far less than the sum of the two judgments which amounted to $193,950.16, with interest at six per cent from the date of the decree, January 4, 1967. Thus, if the court's decree is allowed to stand and Empire is unable to respond to this large judgment, the petitioners who have been grievously and permanently injured will be deprived of the compensation to which the court has found they are justly entitled. Such a result we submit is inconsistent with the philosophy of admiralty law and with the decisions of this Court.

Weyerhaeuser Steamship Company v. *United States*, 372 U.S. 397 (1963), relied upon by the Circuit Court of Appeals, does not hold that a federal compensation act precludes direct recovery in admiralty by an employee against his employer. The question of direct recovery was not reached in that case, as it was in the later cases of *Jackson* and *Yaka*. As the court recognized in its original opinion, however, the *Weyerhaeuser* case does support the contention of the petitioners by holding that the scope of the divided damages rule of admiralty, in the circumstances of that case, was unaffected by the Federal Employees' Compensation Act.

Finally, we submit that the court's reliance upon cases arising under the Harter Act (46 U.S.C., Sec. 1304(2)(a)) is misplaced. The Harter Act, a federal statute, specifically provides that cargo cannot collect directly from the carrying vessel for damages as a result of faults in navigation. There is no valid analogy or correlation between that statute, specifically relating to cargo, and enacted by the Congress pursuant to its jurisdiction over admiralty matters, and a state workmen's compensation law. Neither the Congress nor this Court has applied the theory of the Harter Act to workmen, so as to deny to an injured employee the right to have full recovery in damages for his injuries.

CONCLUSION

It is submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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